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4 **UNITED STATES DISTRICT COURT**

5 **DISTRICT OF NEVADA**

6 ARTURO E. ACOSTA,)
7 Plaintiff,) Case No. 2:09-cv-1998-RLH-RJJ
8 vs.)
9 NAPHCARE, *et al.*,)
10 Defendants.)

ORDER

11 Plaintiff, an inmate proceeding *pro se*, has submitted an Application to Proceed *in Forma*
12 *Pauperis* (#1) and a Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (#1-2). The Court has
13 screened the complaint and finds that it requires amendment.

14 This Court has screened Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A. Federal
15 courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a
16 governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its
17 review, the Court must identify any cognizable claims and dismiss any claims that are frivolous,
18 malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a
19 defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2). Pro se pleadings,
20 however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th Cir.
21 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that
22 a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged
23 violation was committed by a person acting under color of state law. *See West v. Atkins*, 487 U.S. 42,
24 48 (1988).

25 In addition to the screening requirements under § 1915A, pursuant to the Prison Litigation
26 Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if the allegation of

1 poverty is untrue,” or if the action “is frivolous or malicious, fails to state a claim on which relief may
 2 be granted, or seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C.
 3 § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief can be granted is
 4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
 5 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a court dismisses
 6 a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint with directions
 7 as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could
 8 not be cured by amendment. *See Cato v. United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

9 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
 10 *Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a claim
 11 is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim that
 12 would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making
 13 this determination, the Court takes as true all allegations of material fact stated in the complaint, and the
 14 Court construes them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d
 15 955, 957 (9th Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than
 16 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404
 17 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed
 18 factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp.*
 19 *v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A formulaic recitation of the elements of a cause of action
 20 is insufficient. *Id.*, *see Papasan v. Allain*, 478 U.S. 265, 286 (1986).

21 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
 22 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal
 23 conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of
 24 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual
 25 allegations (e.g., fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28

1 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

2 **Screening of the Complaint**

3 Plaintiff claims that he received inadequate medical care by NaphCare, the health care provider
4 at the North Las Vegas Detention Center (NLVDC) and the Clark County Detention Center (CCDC).
5 In Count I, Plaintiff alleges that he injured his right shoulder and hip when he rolled off the top bunk
6 while in custody at the NLVDC. He was given ibuprofen. He states that it took NaphCare 12 days to
7 see him, and he was transferred to CCDC, where he informed them of his injury. In Count II, Plaintiff
8 alleges that the correctional officers at NLVDC never called for medical attention when he advised them
9 of his fall. In Count III, Plaintiff alleges that he received inadequate medical care at CCDC. He claims
10 that he advised them of his fall and injury upon his arrival. Forty-five (45) days later, Plaintiff had two
11 x-rays taken. He was told that the results were normal, but he still experienced pain in his shoulder.
12 Plaintiff alleges that, after twenty (20) months of medical requests and grievances, he was sent to U.M.C.
13 for an evaluation of his shoulder and MRI. He claims he was never told the results of the MRI but that
14 Dr. Hayes told him that there was nothing that he could do for him and he would have to live with the
15 pain. Plaintiff seeks compensatory damages.

16 **A. Defendants**

17 In the caption of his complaint, Plaintiff indicates he is suing NaphCare, NLVDC, and CCDC.
18 In the defendants section of the complaint form, Plaintiff indicates he is suing NaphCare in both
19 individual and official capacities, the Chief of Police for North Las Vegas Detention Center in his
20 official capacity, and Brian Hayes, M.D., Director of NaphCare at Clark County Detention Center in
21 both individual and official capacities.

22 The Civil Rights Act under which this action was filed provides:

23 Every person who, under color of [state law] . . . subjects, or causes to
24 be subjected, any citizen of the United States. . . to the deprivation of any
25 rights, privileges, or immunities secured by the Constitution. . . shall be
liable to the party injured in an action at law, suit in equity, or other
proper proceeding for redress. 42 U.S.C. § 1983.

1 The statute plainly requires that there be an actual connection or link between the actions of the
2 defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department*
3 *of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has
4 held that “[a] person ‘subjects’ another to the deprivation of a constitutional right, within the meaning
5 of section 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to
6 perform an act which he is legally required to do that causes the deprivation of which complaint is
7 made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Because Plaintiff has not articulated any
8 actual connection or link between any actions of Defendant Chief of Police, the Chief of Police must be
9 dismissed with leave to amend.

10 To the extent that Plaintiff is attempting to sue the North Las Vegas Detention Center and the
11 Clark County Detention Center, they are inanimate jail buildings that are not “persons” under § 1983
12 and cannot be sued. If Plaintiff wishes to sue the municipalities that operate those respective detention
13 centers, he must specifically name those municipalities as defendants and go beyond a respondeat
14 superior theory of liability to demonstrate that the alleged constitutional deprivation was the product of
15 a policy or custom of the municipality. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).
16 Therefore, Defendants North Las Vegas Detention Center and the Clark County Detention Center are
17 dismissed with prejudice.

18 In *Kentucky v. Graham*, the Supreme Court clarified the distinction between official and personal
19 capacity suits. 473 U.S. 159, 165 (1984). The Court explained that while individual capacity suits seek
20 to impose personal liability upon a government official for actions performed under color of state law,
21 official capacity actions generally represent another way “of suing an entity of which an officer is an
22 agent.” *Id.* (quoting *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658, 690 n.55 (1978)).
23 In order to establish personal liability in a §1983 action, a plaintiff must show that an individual, acting
24 under color of state law, caused a deprivation of a federal right. *Graham*, 473 U.S. at 166. By contrast,
25 in an official-capacity action, a plaintiff must demonstrate that a policy or custom of an entity

1 contributed to the violation of a federal law. *Id.* That is to say, “the action that is alleged to be
 2 unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially
 3 adopted and promulgated by that body's officers.” *Monell*, 436 U.S. at 690.

4 “To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the
 5 Constitution and laws of the United States, and must show that the alleged deprivation was committed
 6 by a person acting under color of state law.” *West*, 487 U.S. at 48 (citation omitted). States and state
 7 officers sued in their official capacities are not “persons” for purposes of a § 1983 action and may not
 8 be sued under the statute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). On the other
 9 hand, § 1983 allows suits against state officers in their individual capacities for acts they took in their
 10 official capacities. *Haser v. Melo*, 502 U.S. 21, 26 (1991). Because individuals may not be sued in their
 11 official capacities under § 1983 for their actions, and Plaintiff has not alleged a policy or custom
 12 contributed to the violations of federal law, Plaintiff’s claims against the defendants in their official
 13 capacities are dismissed with leave to amend.

14 **B. Constitutional Standards**

15 The Due Process Clause of the Fourteenth Amendment applies to cases concerning conditions
 16 of confinement of pretrial detainees, not the Eighth Amendment prohibition against cruel and unusual
 17 punishment, which only protects convicted prisoners. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979);
 18 *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989).

19 In evaluating the constitutionality of conditions or restrictions of pretrial
 20 detention that implicate only the protection against deprivation of liberty
 21 without due process of law, we think that the proper inquiry is whether those
 22 conditions amount to punishment of the detainee. For under the Due Process
 23 Clause, a detainee may not be punished prior to an adjudication of guilt in
 24 accordance with due process of law.

25 *Bell*, 441 U.S. at 535; *see also Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40, 674 (1977). The
 26 deliberate indifference standard of the Eighth Amendment is applied to sentenced prisoners with serious
 27 medical needs in section 1983 cases. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This standard has also

1 been applied to pre-trial detainees through the Due Process Clause of the Fourteenth Amendment.
 2 *Redman v. County of San Diego*, 942 F.2d 1435, 1442-43 (9th Cir. 1991).

3 The requirement of conduct that amounts to “deliberate indifference” provides
 4 an appropriate balance of the pretrial detainees’ right to not be punished with
 5 the deference given to prison officials to manage the prisons. This standard
 6 also comports with the purpose of the due process clause: to protect against
 7 the deliberate, arbitrary choices by government.

8 *Id.* at 1443.

9 The test for whether a prison official acts with deliberate indifference is a
 10 subjective one: the official must “know [] of and disregard [] an excessive
 11 risk to inmate health and safety; the official must both be aware of the facts
 12 from which the inference could be drawn that a substantial risk of serious
 13 harm exists, and he must also draw the inference.”

14 *Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir. 1995) (citing *Farmer v. Brennan*, 511 U.S.
 15 825, 837-38 (1994)). Where the plaintiff is a pretrial detainee the appropriate analysis of his claims
 16 comes under the due process rubric, and the appropriate standard of review under the due process clause
 17 is the “deliberate indifference” standard.¹ The court will construe this claim as a claim that defendants
 18 violated his due process rights under the Fourteenth Amendment, as is appropriate for a pretrial
 19 detainee. The deliberate indifference standard requires actual knowledge and subjective intent.

20 “Deliberate indifference to a prisoner’s serious illness or injury states a cause of action under §
 21 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105 (1976); *see also Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir.
 22 1995); *Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995). This rule applies to “physical,
 23 dental, and mental health.” *See Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982). An inmate
 24 claiming that jail officials failed to attend to medical needs must establish 1) a serious medical need and
 25 2) deliberate indifference to that need by jail officials. *McGuckin v. Smith*, 974 F.2d 1050, 1050-60 (9th
 26 Cir. 1992). A medical need is serious if the failure to treat the inmate’s condition could result in further

1 Accordingly, the court will utilize cases construing the Eighth Amendment cruel and unusual punishment clause in analyzing plaintiff’s claims. For example, the appropriate standard for evaluating medical claims brought by pretrial detainees is the same one used to evaluate convicted prisoners’ claims under the Eighth Amendment. *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996) (Eighth Amendment guarantees minimum standard of care for pretrial detainees).

1 significant injury or the “unnecessary and wanton infliction of pain.” *Id.* at 1059 (citing *Estelle v.*
 2 *Gamble*, 429 U.S. 97, 104 (1976)).

3 Deliberate indifference can be manifested by prison guards intentionally denying or delaying
 4 access to medical care or intentionally interfering with the treatment once prescribed. *Estelle v. Gamble*,
 5 429 U.S. at 104-05. However, where a prisoner alleges a delay in receiving medical treatment, the
 6 prisoner must allege that the delay led to further injury. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th
 7 Cir. 1992), *overruled on other grounds*, *WMX Techs, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir.
 8 1997); *Shapely v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985).

9 A difference of opinion between medical professionals concerning the appropriate course of
 10 treatment generally does not amount to deliberate indifference to serious medical needs. *See Sanchez*
 11 *v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). To establish that a difference of opinion amounted to
 12 deliberate indifference, the prisoner “must show that the course of treatment the doctors chose was
 13 medically unacceptable under the circumstances” and “that they chose this course in conscious disregard
 14 of an excessive risk to [the prisoner’s] health.” *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.),
 15 *cert. denied*, 519 U.S. 1029 (1996); *see also Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992)
 16 (stating that prisoner may demonstrate deliberate indifference if prison officials relied on the contrary
 17 opinion of a non-treating physician). In addition, a difference of opinion between the physician and the
 18 prisoner concerning the appropriate course of treatment does not amount to deliberate indifference to
 19 serious medical needs. *See Jackson*, 90 F.3d at 332; *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir.
 20 1981).

21 Although neither a physician’s negligence nor a prisoner’s disagreement with a particular course
 22 of treatment states a claim for deliberate indifference, a prison medical staff’s acts or omissions will
 23 constitute deliberate indifference if staff members knew of and disregarded an excessive risk to an
 24 inmate’s health. *Farmer v. Brennan*, 511 U.S. at 837. Prison officials are deliberately indifferent to a
 25 prisoner’s serious medical needs when they “interfere with treatment once prescribed.” *Estelle v.*
 26

1 *Gamble*, 429 U.S. at 104-05. The Ninth Circuit has found deliberate indifference where prison officials
 2 “deliberately ignore the express orders of a prisoner’s prior physician for reasons unrelated to the
 3 medical needs of the prisoner.” *Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992)(reversing
 4 summary judgment where prison officials forced prisoner to endure a plane flight that resulted in ear
 5 injury, in direct contravention of a treating physician’s previous orders); *Ortiz v. City of Imperial*, 884
 6 F.2d 1312, 1314 (9th Cir. 1989)(per curium)(reversing summary judgment where medical staff knew
 7 that pretrial detainee had head injury, but prescribed contraindicated medications, disregarding evidence
 8 of complications to which they had been specifically alerted by private treating physician); *Tolbert v.*
 9 *Eyman*, 434 F.2d 625 (9th Cir. 1970)(finding cognizable claim for deliberate indifference where warden
 10 refused to authorize prisoner’s receipt of medicine that had been previously prescribed by a physician);
 11 *Cf. McGuckin v. Smith*, 974 F.2d 1050, 1062 (9th Cir. 1992)(where surgery recommended by prisoner’s
 12 prior physician was severely delayed, court was unable hold doctors liable because prison administrators,
 13 not the doctors, were responsible for scheduling treatment).

14 **C. Count I**

15 Plaintiff alleges that he injured his right shoulder and hip when he rolled off the top bunk while
 16 in custody at the NLVDC. He was given ibuprofen. He states that it took NaphCare 12 days to see him.
 17 The next day he was transferred to CCDC, where he informed them of his injury. Plaintiff states that
 18 he had a x-ray taken, which was normal. After 20 months of medical request grievances, he was sent
 19 to UMC (University Medical Center) for an expert evaluation for his continuing pain and told by Dr.
 20 Hayes at CCDC that nothing else could be done.

21 Plaintiff has not alleged facts to support a claim of deliberate indifference to his serious medical
 22 needs because he has not asserted anything more than negligence or disagreement with his diagnosis.
 23 Thus, Plaintiff’s claim in Count I will be dismissed with leave to amend.

24 **D. Count II**

25 Plaintiff alleges that the corrections officers at NLVDC never called for medical

1 attention/personnel after Plaintiff informed them of his fall. Plaintiff states that he advised several
2 correctional officers about his fall but nothing was done.

3 Plaintiff has not alleged facts to support a claim of deliberate indifference to his serious medical
4 needs because he has not shown that the officers knew of and disregarded an *excessive* risk to Plaintiff's
5 health. Therefore, Plaintiff's claim in Count I will be dismissed with leave to amend.

6 **Conclusion**

7 Plaintiff's complaint is dismissed because Plaintiff fails to state a claim upon which relief may
8 be granted. Plaintiff will be granted leave to amend his complaint if he believes he can correct the
9 deficiencies noted.

10 Based on the foregoing, and with good cause appearing,

11 **IT IS HEREBY ORDERED** that the complaint is **DISMISSED** with leave to amend. The
12 amended complaint must be a complete document in and of itself, and will supersede the original
13 complaint in its entirety. Any allegations, parties, or requests for relief from prior papers that are not
14 carried forward in the amended complaint will no longer be before the Court. Plaintiff will have **thirty**
15 **(30) days** from the date that this Order is entered to file his amended complaint, if he believes he can
16 correct the noted deficiencies. **Failure to comply with this Order will result in the dismissal of this**
17 **action.**

18 **IT IS FURTHER ORDERED** that Plaintiff shall clearly title the amended complaint as such
19 by placing the words "FIRST AMENDED" immediately above "Civil Rights Complaint Pursuant to 42
20 U.S.C. § 1983" on page 1 in the caption, and Plaintiff shall place the case number, 2:09-CV-1998-RLH-
21 RJJ, above the words "FIRST AMENDED" in the space for "Case No."

22 **IT IS FURTHER ORDERED** that the Clerk shall send to Plaintiff two copies of a blank
23 Section 1983 civil rights complaint form with instructions along with one copy of the original complaint.

24 DATED: September 2, 2010.

25 
26 Robert J. Stanton
UNITED STATES MAGISTRATE JUDGE